NEVADA FLYERS

IBLA 75-47 Decided December 24, 1974

Appeal from decision of the Nevada State Office, Bureau of Land Management, canceling public airport lease N-3812.

Set aside and remanded.

1. Airports -- Public Lands: Leases and Permits

> It is premature to cancel a public airport lease for failure to establish, maintain and use the site as a public airport when the lessee was given no clear criteria sufficient to permit compliance. Under the circumstances, the lessee will be granted an extension of time to develop additional improvements and maintenance of the airport in accordance with Federal Aviation Administration requirements.

APPEARANCES: Earl R. Butler, Vice President, Nevada Flyers, for appellant.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Nevada Flyers, an unincorporated, non-profit, pilots association set up to foster the development and safety of private and general aviation in the State of Nevada, has appealed from a decision of the Nevada State Office, Bureau of Land Management (BLM), dated June 26, 1974, canceling its public airport lease N-3812.

Pursuant to the Act of May 24, 1928, as amended, 49 U.S.C. §§ 211-14 (1970), Nevada Flyers filed a lease application with the BLM on May 1, 1969, for land to construct and operate the Nevada Flyers Airport (subsequently named the Lear Reno #2 Airport). The application, as modified, requested lands in sec. 22, T. 21 N., R. 20 E., M.D.M. In its initial application, appellant proposed to establish a graded dirt runway running north/south with a length extending 3,000 feet. Appellant sent a notice of the proposed airport to the Federal Aviation Administration (FAA) in order to get airspace clearance approval. By letter dated July 28, 1969, the FAA informed appellant that it had no objection to the landing

area as it would not adversely affect the safe and efficient use of airspace by aircraft. The FAA noted that the landing area did not meet the minimum runway length requirement for Basic Utility-Stage One airports, and would therefore be designated as a Landing Strip. Referring appellant to FAA publication "Utility Airports," AC 150/5300-4A (1968), the FAA recommended that appellant extend the landing area to 4450 feet. The letter closed by stating that "the above determination does not waive the requirements of any other governmental agency."

After receiving the FAA letter from appellant, the BLM forwarded a copy of the lease application to the FAA requesting its recommendations regarding the suitability of the lands for public airport purposes, and inquiring as to what facilities for service, fuel and other supplies would be necessary to make the lands available for public use as an airport. The BLM informed the FAA that the Act of May 24, 1928, authorized the leasing of public lands only for public airports, and could not be used to provide a private-use Landing Strip. By letter dated August 6, 1969, the FAA informed the BLM that modification of the proposal to meet public use standards would involve, in part, constructing the runway to a minimum length of 4,250 feet as provided for in agency dimensional criteria, and providing a 20:1 clear approach surface in accordance with 14 CFR Part 77. By letter dated August 12, 1969, the FAA informed appellant of the public use modification requirements. The letter closed by stating that "[w]e have no requirements regarding services to be provided at airports constructed under Bureau of Land Management leases."

Thereafter, appellant modified its lease application to conform to the extended runway requirement. The BLM forwarded a copy of the renewed [**4] application to the FAA and the FAA determined that the subject land was suitable for airport purposes and indicated that an airport at the proposed location would be desirable. On December 1, 1969, a field report was prepared by a BLM field examiner who concluded the following:

> The main runway will be 4500' in length (FAA requirements); will be open to the public for their use; the applicants are a non profit educational organization and the lands are suited to public airport development. Federal, state and local governments contacted are not adverse to this development.
>
> Therefore it is recommended that the subject application be approved as amended. Development must be in accordance with FAA requirements.

On February 20, 1970, appellant was issued a 20-year public airport lease. The terms of the lease stated, in part, the following:

> Sec. 2. [The lessee agrees]
>
> (a) To establish a public airport on said tract and to maintain such airport during the life of this lease.
>
> * * * * * * *
>
> (c) To complete the construction facilities for service, fuel, and other supplies as necessary to make the land available for public use as an airport within six months from the execution of this lease.
>
> (d) At all times to keep the airport equipped and maintained in accordance with the requirements made by the Federal Aviation Administration.
>
> * * * * * * *
>
> Sec. 3.
>
> (c) That if the lessee shall fail to: (1) use the premises or any part thereof, for a purpose consistent with the use contemplated herein; (2) pay the annual rental or any part thereof; (3) comply with the provisions of this lease; or, (4) maintain the premises in accordance with the requirements of the Federal Aviation Administration, the lessor, in its discretion, may terminate and cancel this lease.

In a letter accompanying the lease, the BLM requested that appellant post at the airport facility signs indicating that the airport was a public facility subject to the anti-discrimination provisions of Title VI of the Civil Rights Act of 1964.

On August 21, 1970, the BLM sent appellant a reminder letter requesting that it submit the required six-month report showing that the airport had been established in compliance with the terms of the lease. On August 31, 1970, appellant's report was filed and its substantive portion stated that a "runway has been established as a dirt field in accordance with the provisions of the lease and all federal requirements. In addition, a tie down area has been roughed in capable of taking 80 aircraft." On September 2, 1970, the BLM informed appellant that the report "contains all the information needed."

On November 1, 1971, the FAA received a complaint regarding appellant's airport from Mrs. Audrey C. Harris, an adjoining landowner. Mrs. Harris was opposed to the installation of an airport next to her property and pointed out that no improvements has been installed other than a dirt runway and that the airport was unsupervised. By letter dated November 3, 1971, the FAA informed Mrs. Harris that the matter was not within their jurisdiction as "[t]he Federal Aviation Administration does not administer Bureau of Land Management leases * * *." A copy of the complaint was forwarded to the BLM, and by letter dated November 9, 1971, the BLM informed Mrs. Harris that all requirements of the lease were being met as, "[t]he Federal Aviation Administration has not seen fit to specify that fueling and other facilities are available on the leased land nor have they required that the site be under constant supervision."

Mrs. Harris continued to complain to the BLM about the airport and requested that an on-site inspection be made in order to determine whether appellant had complied with all the terms of the lease. On February 1, 1972, the BLM conducted an on-site inspection of the airport and discovered that appellant had failed to comply with two of the lease requirements: (1) the runway was only 3,896 feet long, thus, not meeting the FAA's minimum requirements for an airport, and (2) there were no posted signs at the airport bearing the information regarding public rights under Title VI of the Civil Rights Act of 1964. By letter dated February 1, 1972, the BLM informed appellant of the violations and granted a period of 60 days for appellant to correct the deficiencies. On March 7, 1972, the BLM received appellant's compliance letter which stated that the runway had been extended to a length of 4,336 feet. The letter further went on to state that, "we have placed another notice on the property. The last one evidently was shot away when the wind sock was stolen. It is the second wind sock, frame and mount that has been stolen from the property. The new sign is on a steel stake mounted adjacent to the major entrance to the airport." In a BLM memorandum dated June 6, 1972, it was noted that appellant had corrected the deficiencies and compliance had been met.

Another BLM compliance investigation was conducted on April 15, 1974. The realty specialist noted that the only improvements on the ground were one runway, a taxi strip, and an area for the parking of planes. These improvements were simply areas where the vegetation had been bladed off and the ground rudimently smoothed and leveled. There were no signs of any aircraft activity having taken place on the land, nor was there a wind sock or any signs indicating that the site was a public airport. In a memorandum dated June 18, 1974, from the District Manager to the State Director, BLM, the following was stated:

> [I]t is concluded that the subject lands are not being used as a public airport. What are considered to be minimal improvements have been made on the lands, but this does not constitute an airport. Although the cancellation of the lease will not change the conditions existing on the ground, it will remove an unnecessary encumbrance from these national resource lands.
>
> It is hereby recommended that the subject airport lease be cancelled due to non-compliance by the lessee.

In its decision dated June 26, 1974, the BLM canceled appellant's lease on the grounds that the appellant failed to establish, maintain and use the leased premises as a public airport. The decision noted the observations made in the field investigation report and went on to state the following:

> It is acknowledged that the lessee had had the area posted and a wind sock in place. However, at the time of the field examination, April 15, 1974, they were non-existent.
>
> Law and regulations require that the lands be maintained and used as a public airport. the lessee has the responsibility to maintain the site. Such maintenance would at lease include a wind sock as a safety precaution.
>
> Accordingly, 30 days from your receipt of this decision, the subject lease will be cancelled and closed without further notice.

On appeal, Nevada Flyers states the following:

> It is true that we have been unable to keep a wind sock in place on the runway. We are working towards a trailer overlay so that a place can be provided for a watchman to stay on the site. The site has been posted with no effect whatever on vandals. They persist in knocking down, shooting, and carrying away anything that is erected.
>
> We have put time, effort, and money into surveying, designing, grading, and maintaining this site. Our overall costs have been approximately eleven thousand dollars. We are at present in the process of purchasing a truck in order to

> haul our grader up from Las Vegas to use on the runways and to improve the parking area. It does seem to us that a years extension should be granted so that we may show further progress in our efforts.

We hold that the BLM's cancellation of appellant's public airport lease was premature. A review of the applicable law will explain the basis for our determination. 49 U.S.C. § 211 (1970) states the following:

> The Secretary of the Interior is authorized, in his discretion and under such regulations as he may prescribe, to lease for use as a public airport any contiguous public lands, unreserved and unappropriated, not to exceed two thousand five hundred and sixty acres in area, subject to valid rights in such lands under the public-land laws.

49 U.S.C. § 212 provides in part that,

> the lessee shall maintain the lands in such condition, and provide for the furnishing of such facilities, service, fuel, and other supplies, as are necessary to make the lands available for public use as an airport of a rating which may be prescribed by the Administrator of the Federal Aviation Agency.

Regulations in 43 CFR Part 2910 promulgated pursuant to the Act provide, in part, the following:

> § 2911.2-2 Upon receipt of the application one copy will be referred to the Administrator, Federal Aviation Administration for consideration as to what fuel facilities, lights, and other furnishings are necessary to meet the rating set by that department. After the Administrator, Federal Aviation Administration, has reported, a lease on a form approved by the Director will be prepared and sent to the applicant for execution.
>
> § 2911.1-2(a) Report by lessee. The lessee shall, within 6 months from the date of the lease, equip the airport as required by the Administrator, Federal Aviation Administration, and file a report thereof in the land office.
>
> (b) Inspection by Federal Aviation Agency; report. At any time during the term of the lease the Administrator, Federal Aviation Administration, may have an inspection made of the airport, and

> if it does not comply with the ratings set by the Federal Aviation Administration that fact, with a statement as to wherein it fails, will be referred to the Bureau of Land Management for appropriate action.
>
> (c) Cancellation of lease. The authorized officer may, in his discretion cancel a lease issued under the act of May 24, 1928, for any of the following reasons: If the lessee fails to use the leased premises or any part thereof, or uses it or any part thereof for a purpose foreign to the proper use, or shall fail to maintain the premises according to the ratings set by the Federal Aviation Administration, or shall fail to comply with the regulations in this part or the terms of the lease.

Both the Act of May 24, 1928, and the regulations promulgated thereto, recognize that the Federal Aviation Administration is the proper agency for setting standards for and exercising expert supervision over the technical aspects of public airport matters. Pursuant to 49 U.S.C. §§ 1341, 1346, 1348, 1353, 1501 and 1710, the FAA is empowered to promulgated such regulations it deems necessary to promote minimum safety standards for the operation of public airports, to promote safety in air commerce, to formulate policy with respect to air navigation and airspace utilization, and to control the construction of objects affecting navigable airspace. See 14 CFR Parts 77 and 157.

The Department of the Interior has consistently requested FAA advice and recommendations with regard to public airport matters. Nevada Flyers, 10 IBLA 311 (1973); Board of County Com'rs, White Pine County, Nevada, A-29738 (January 14, 1964); Elmore J. Bragg, A-25697 (August 4, 1949); Allen A. Daley, A-25575 (March 1, 1949). In Nevada Flyers, cited above, the Board affirmed a rejection of an airport lease application on the basis of an aeronautical study by the FAA determining the site to be unacceptable. We stated at 313:

> The FAA's conclusions are reasonable and, although the Department is not bound to, it may accept them in the exercise of its discretionary power. See Duncan Miller, 6 IBLA 216, 79 I.D. 416 (1972). The reasonable recommendations of another governmental agency relating to matters within its special competence will be relied upon. Quantex Corporation, 4 IBLA 31, 78 I.D. 317 (1971). (Emphasis added.)

See also Northwestern Colorado Broadcasting Co., 18 IBLA 62, 67 (1974).

An additional indication of the Department's reliance upon FAA expertise with regard to public airport matters is set out in the BLM Manual, Vol. V, § 3.2, AIRPORTS AND AVIATION FIELDS (August 8, 1958). Section 3.8(B) directs BLM personnel to request a report from the Civil Aeronautics Administration (now FAA) upon receipt of an application to lease public lands for airport purposes. Section 3.12(b)(1)(c) indicates that after receipt of the six-month report following issuance of the lease, if the report shows failure to install the required facilities, the BLM is to inform the FAA of the facts and request its recommendation on whether an extension of time should be granted. Matters concerning compliance with lease terms are covered in Section 3.14, which states in part the following:

> At five-year intervals the Adjudication Officer will write to the [FAA] for a report on the use of the lands by the lessee * * *.
>
> A. If the [FAA] reports noncompliance, the Adjudication Officer will refer the matter to the Classification Officer and take further action as that officer recommends.
>
> B. * * *.
>
> (1) If the [FAA] reports violation of the lease terms and conditions, the Classification Officer will make such supplemental investigations as may be necessary [and] will advise the Adjudication Officer to take such action as is appropriate in the circumstances.

The record clearly indicates that the State Office failed to follow some of the FAA referral procedures which the Act, regulations, BLM Manual and Departmental decisions set forth. We note that part of the problem stems from the FAA's possible misconception of its role respecting public airports located on lands being administered by the BLM. As an initial matter, the FAA informed appellant and the BLM that modifications to meet public use standards would involve, in part, extension of the proposed runway. The FAA, however, refrained from giving any further recommendations regarding airport development and maintenance. As noted above, at one point it stated that "[w]e have no requirements regarding services to be provided at airports constructed under Bureau of Land Management leases;" and in response to the complaint that the airport had not been properly improved, "[t]he Federal Aviation Administration does not administer Bureau of Land Management leases * * *." Thus, it was not surprising that the BLM responded to the complaint by stating that all require-

ments of the lease were being met since "[t]he Federal Aviation Administration has not seen fit to specify that fueling and other facilities are available on the leased land * * *."

The Act of May 24, 1928, contemplates the installation of facilities necessary to make the land available for public use as an airport and requires that the lessee maintain the facility in accordance with FAA recommendations adopted by the BLM. As noted in FAA publication "Utility Airports," supra, every public airport, regardless of its size and activity, should have an effective maintenance and safety program in order to insure efficient use and eliminate unsafe conditions for the protection of the public. The FAA has developed numerous measures for assuring that these conditions are met. 14 CFR Parts 77 and 157. Recommendations from the FAA should not have terminated following its advice that the land was suitable for public airport use. The fact that the airport is situated on public land under the jurisdiction of the BLM is of no consequence. The Act and the regulations demonstrate that the FAA is to have a continuing role in advising the BLM on proper development and maintenance of public airports.

Despite the clear language of the Departmental regulation, the BLM issued a lease without a report from the FAA detailing the fuel facilities, lights and other furnishings the lessee would be required to install. As a result, it was thereafter difficult to determine what the lessee's obligations were. For example, the State Office stated that proper maintenance of a public airport "would at least include a windsock as a safety precaution." While this observation is undoubtedly sound as a matter of airport safety, See "Utility Airports," supra at 56, neither the FAA nor the State Office affirmatively imposed the requirement upon the lessee. The same comment applies to the BLM criticism that there was no sign identifying the site as a public airport.

It is apparent that the improvements on the subject "airport" are minimal in nature, and that there may be a serious question whether the site has been established, maintained and used as a public airport. However, in view of the failure to obtain at the outset FAA requirements for equipping the airport, there are no specific inadequacies to charge against the lessee at least as to establishment and maintenance. In the absence of requirements for developing airport facilities, a determination by the BLM whether the site has been used as an airport is premature.

[1] As the record indicates, there are no improvements on the airport site with the exception of the cleared areas for a runway and parking. On appeal, Nevada Flyers alleges that it has invested a substantial amount of time, effort and money in developing the site and requests an extension of time to permit further progress in its efforts. Under the circumstances we do not decide whether appellant has satis-

fied the requirements of the Act. Appellant's request for an extension of time for further development is granted. the State Office is directed to inform the FAA of our view that it is authorized to set the equipment standards and to inspect the airport for compliance with FAA requirements even though the airport is situated on public lands. After these requirements have been set, the lessee will be notified and given six months to equip the airport in accordance with them. Thereafter, a determination of whether the site has been established, maintained and used as a public airport can be made by the FAA and the State Office, respectively, for matters committed to each. If upon consultation, the FAA states that it has no additional requirements for airports of this general class, regardless of land title, the State Office will evaluate the lease in light of that determination.

Accordingly, pursuant to the authority vested in the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is remanded to the Bureau of Land Management in order that appellant may have an opportunity to comply with further FAA recommendations adopted by the BLM regarding facilities, maintenance and other requirements necessary for proper public airport development.

Martin Ritvo
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Edward W. Stuebing
Administrative Judge